APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-15742

Non-Argument Calendar

Agency No. A77-977-849

YI QIANG YANG,

Petitioner

versus

U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of a Decision of the Board of Immigration Appeals

---

(Aug. 8, 2007)

Before BLACK, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Court, on its own motion, grants rehearing and substitutes this opinion for the one we issued earlier this month. See *Yang v. United States Attor-*

ney General, 2007 WL 2000044 (11th Cir. July 12, 2007).

Yi Qiang Yang, a native and citizen of China, entered the United States illegally on September 28, 2001. While he was detained at the airport, immigration officials conducted an entrance interview. They asked Yang why he came to the United States. He said that he came because America was "better [than] China" and "the greatest country in the world," and he wanted "to earn a living." Yang was then asked whether he had any reason to fear returning to China. He said that he might be put in jail for not having a passport, but that he would not be harmed. However, Yang continued, he "really [did not] want to go back to China." When asked for his marital status, Yang said he was "single."

Yang was charged with removal for, among other things, failing to possess a valid entry document at the time he sought admission into the country, in violation of 8 U.S.C. § 1182(a)(7)(A)(i)(I). Yang conceded that he was removable based on this charge. He also applied for asylum, withholding of removal, and relief under the Convention Against Torture.

At his asylum hearing, Yang testified that he and Jiang Hui Ling had a "traditional marriage ceremony" with friends and family on July 15, 2000. They could not be formally married, according to Yang, because under Chinese law they were under the legal age-Yang was 20 and Ling was 17.

The couple discovered that Ling was pregnant in February 2001. Because they were not legally married, Yang said, the Chinese government would force Ling to have an abortion if it discovered that she was

pregnant. To avoid detection, Yang and Ling hid at Yang's grandmother's house.

The government found out anyway. On July 3, 2001, family planning officials took Ling to the hospital to have an abortion. When Yang discovered that Ling was missing, he went to the hospital to free her. Once there, five government officials began to beat Yang, but, according to him, he grabbed a broom, beat the officials off of him, and escaped.

Yang did not return to his home because the family planning officials were waiting for him there; the next day they sent a subpoena ordering that Yang come to the local security office. Yang later heard that Ling had been forced to abort the baby. He left China on September 25, 2001.

In addition to his testimony, Yang submitted corroborating evidence in support of his asylum petition. Among the exhibits introduced at the asylum hearing, Yang offered: (1) the State Department's country report on China; (2) a note from Lianjiang hospital, dated July 3, 2001, stating that Ling had an induced abortion; (3) a subpoena from the local security office, dated July 4, 2001, summoning Yang to its office the next day; (4) a receipt, dated July 2, 2000, for two wedding rings paid for by Yang; and (5) a letter from Yang's uncle stating that he attended Yang's "traditional wedding" on July 15, 2000, Yang and Ling were married by traditional means because "early marriage is forbidden," and when Ling was forcibly taken by family planning officials to have an abortion, Yang "tried to save his wife and fought with the officials."

Yang's exhibits also included an affidavit and a letter from Ling. The affidavit, dated March 10,

2005, stated that she and Yang "held a wedding according to the old traditional custom on July 15, 2000 . . . and started to live together without going through the marriage registration formalities." The letter, dated January 7, 2003, gave the following account of her marriage, pregnancy and abortion:

> Dear Husband, do you still remember our wedding on July 15, 2000? Sometime after our marriage, in around February 2001, I did not feel good and went to see a doctor. It was then we found out I would give birth to our child . . . . But since China has a very strict checking system on Family Planning, we women have to have physical check up every three-month. On July 3rd, Mom called us and said she was very sick. We were very worry and afraid something might happen, so we rushed back to visit her. After you found out she was really sick, you sent her to the hospital immediately and left me home alone. At around 2 p.m. in the afternoon there came seven people. They claimed they were from the Family Planning Office and tried to take me away forcefully. Even though I tried to struggle and begged for their mercy, they would not bother to care. They took me to Lianjiang County Hospital and locked me up in a room. A moment later two nurses came inside. One of the nurses who had a syringe in her hand gave me a shot in my abdomen. After a few minutes, I had a very sharp pain in that area. And after my baby came out of my body, I saw the nurses put the poor baby in a plastic bag. I was so shock that I passed out. After I regain my consciousness, my mother told me that you tried to save me and

> fought with the officials of the Family Planning Office. The Cadres of the Family Planning Unit were looking for you and tried to arrest you.

The immigration judge found that Yang was not entitled to asylum because he had not established that he was subject to past persecution or that he had a well-founded fear of future persecution. The IJ acknowledged that in *Matter of C-Y-Z-* the Board of Immigration Appeals held "that an alien who's [sic] spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion as a refugee within the definition of that word under Section 101(a)(42) of the Immigration and Nationality Act." But the IJ found that Yang had "failed first of all to prove that he and this person he describes as his wife entered into a traditional marriage in [his] country of China."

The IJ also found that Yang had "failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China." And, the IJ found that in Yang's "own mind he is single. That's why he answered the question regarding his marital status as being single."

The IJ concluded that Yang had "failed to establish . . . a spousal relationship between him and the person he described or referred to as his wife throughout his application." Therefore,

> even if the Court were to conclude that [Yang] was able to prove that the person he refers to as his wife was forced to undergo abortion he cannot benefit from that. The reason is that he failed to show that they

> were legally married and the decision in the *Matter of C-Y-Z-*, applies only where a spousal relationship has been established between the respondent and the spouse. The Court concludes that the Board of Immigration Appeals['] [decision] in the *Matter of C-Y-Z-*, does not apply in [Yang]'s case.

The IJ also concluded as an alternative ground for denying Yang's petition that the encounter with family planning officials he described was not sufficiently serious to constitute persecution. As to any well-founded fear of future persecution, the IJ found Yang's testimony to be not credible, and therefore, according to the IJ, Yang had not presented sufficient evidence that "anyone in China is looking for him on account of a protected ground."

Because Yang had not met his burden as to asylum, the IJ concluded that he could not meet the higher burden for establishing entitlement to withholding of removal. And as to Yang's CAT claim, the IJ concluded that Yang had "failed to establish that he was tortured in his country or that it is more likely than not that he would be tortured if he were to return to his country."

The BIA dismissed Yang's appeal of the IJ's decision. The BIA agreed with the IJ that "an applicant must have entered into a legally recognizable marriage in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*.," and "[u]nderage couples living in de facto unregistered relationships are not recognized as married by the Chinese government."

The BIA also concluded that Yang was not entitled to relief based on his own independent opposi-

tion to China's population control program. The BIA agreed with the IJ that Yang was not credible given the inconsistencies between his initial airport interview and his asylum application. Therefore, the BIA concluded that Yang's testimony regarding his confrontation with the family planning officials was to be disregarded.

Yang petitions for review of the BIA's decision on his asylum and withholding of removal claims.[1] He contends that: (1) the BIA's disparate treatment of lawfully married couples from traditionally married couples is a violation of the Equal Protection Clause; (2) the BIA's adverse credibility finding is not supported by the record; (3) the BIA's decision that Yang and Ling's marriage was not a spousal relationship was an unreasonable interpretation of the refugee statute, 8 U.S.C. § 1101(a)(42), and the *C-Y-Z-* decision; and (4) the BIA's conclusion that Yang had not been persecuted for resisting China's coercive population control program was not supported by the record.

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien in this country if he meets the definition of "refugee." 8 U.S.C. § 1158(b)(1). A "refugee" is

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to re-

---

[1] Yang has not sought review of the BIA's decision to deny him relief under the CAT. He has therefore abandoned that issue here. See *Sepulveda v. United States Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005).

> turn to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. § 1101(a)(42). "[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion . . . ." *Id.*

The BIA's factual determinations are reviewed under the substantial evidence test, and we must affirm the BIA's decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1283-84 (11th Cir. 2001). The substantial evidence test is deferential and does not allow us to re-weigh the evidence from scratch. *Mazariegos v. Office of United States Att'y Gen.*, 241 F.3d 1320, 1323 (11th Cir. 2001). The BIA's "decision can be reversed only if the evidence 'compels' a reasonable fact finder to find otherwise." *Sepulveda*, 401 F.3d at 1230 .

Yang first argues that BIA's disparate treatment of legally married couples from traditionally married couples violated the Equal Protection Clause. We cannot reach the merits of Yang's equal protection argument because he failed to exhaust his administrative remedies by raising it before the BIA. *Amaya-Artunduaga v. United States Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006) (petitioner failed to exhaust his administrative remedies where he did not

raise argument in notice of appeal or brief before the BIA). Accordingly, we lack jurisdiction to consider the argument now. *Id.* (the Court "lack[s] jurisdiction to consider a claim raised in a petition for review unless the petitioner exhausted his administrative remedies with respect thereto"); see also 8 U.S.C. § 1252(d) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right . . . ."). We will therefore dismiss this part of Yang's petition.

Yang's second contention is that the BIA's adverse credibility finding is not supported by the record. Specifically, Yang argues that inconsistencies between his initial interview at the airport and his later statements do not necessarily suggest, as the BIA concluded, that his later statements are not credible. Indeed, three of our sister circuits have held that an airport interview should only be used against an alien where the interview meets certain indicia of reliability. See *Balogun v. Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004) ("airport interviews only are useful and probative if they are reliable"); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the BIA must be cognizant of the interview's limitations when using its substance against an asylum applicant."); *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998) ("That there were some inconsistencies between the airport statement and Balasubramanrim's testimony before the immigration judge is not sufficient, standing alone, to support the Board's finding that Balasubramanrim was not credible.")

We have had no occasion to address the reliability of airport interviews, and this case continues that trend. There was other evidence in the record supporting Yang's account of the events, but even assuming for present purposes that everything he said is true, he still has not met his burden to establish that the BIA's decision to deny him asylum and withholding of removal was not supported by substantial evidence, as we discuss below.

Yang next argues that the BIA's decision that only legal spouses are entitled to protection under the family planning provisions of the refugee statute, 8 U.S.C. § 1101(a)(42), is an unreasonable application of that statute. In its *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (en banc), decision, the BIA confirmed the INS' position that "the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution." *Id.* at 918. Quoting from a 1996 INS memorandum, the BIA said that "an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition." *Id.* at 917-18.

In its *In re S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006) (en banc), decision the BIA "decline[d] to extend [its] holding in *Matter of C-Y-Z-*, as modified, to unmarried applications claiming persecution based on a partner's abortion or sterilization." *Id.* at 4. "[W]e limit our holding to applicants who are legally married under Chinese law." *Id.* (footnote omitted). This limitation was necessary, the BIA said, because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried

father. From the point of view of the wife, the local community, and the government, a husband shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives . . . ." *Id.* at 9. The BIA continued: "In the absence of a legal marriage, evaluating the existence of the requisite nexus is problematic, both as to whether the applicant was, in fact, the father of the child and as to whether local officials considered him responsible, or were even aware of his involvement." *Id.* at 9-10.

Yang argues that the legal marriage requirement in *S-L-L-* is unreasonable. The BIA's interpretation of immigration statutes are due *Chevron* deference where appropriate. *Balogun v. United States Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005). "Under Chevron *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), where Congress in a statute has not spoken unambiguously on an issue, the interpretation of the statute by an agency entitled to administer it is entitled to deference so long as it is reasonable." *Mazariegos*, 241 F.3d at 1327 n. 4. "The degree of deference is especially great in the field of immigration." *Id.*

The decision to allow husbands to claim refugee status because their wives were forced to have abortions was based solely on the BIA's interpretation of the refugee statute in *C-Y-Z-* and *S-L-L-*, and not on anything Congress explicitly said in § 1101(a)(42). Because Yang concedes that he was not Ling's legal spouse, we have no occasion to decide whether the BIA's interpretation of the refugee statute is due *Chevron* deference. See generally *Lin v. United States Dep't of Justice*, 494 F.3d 296, 2007 WL

2032066 (2d Cir. July 16, 2007) (en banc) (rejecting the BIA's position that 8 U.S.C. § 1101(a)(42) extends automatic refugee status to spouses of individuals that the provision expressly protects). Instead, all we need decide is whether, assuming husbands of women who were forced to have an abortion are entitled to asylum for that reason, the BIA's decision to deny derivative protection to unmarried fathers of aborted children is unreasonable.

We conclude that it is not. As the Board noted in the S-L-L- decision, legal marriage reflects a sanctity and long-term commitment that other forms of cohabitation simply do not. A legal husband, at least in the eyes of the government, shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives.

Furthermore, as the BIA observed, "benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the Immigration and Nationality Act that 'it would seem absurd to characterize reliance on marital status in *C-Y-Z-* as arbitrary and capricious.' " *S-L-L-*, 24 I. & N. Dec. at 9 (quoting *Chen v. Ashcroft*, 381 F.3d 221, 227 n.6 (3d Cir. 2004)). We agree. Paternity of the baby is presumed when a woman gives birth in wedlock. As the BIA noted, determining paternity of the aborted baby is considerably more difficult, yet essential for asylum based on family planning refugee status, where the mother and father have no legal relationship. *Id.* at 10. Using marital status is "a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance

of a forced abortion or sterilization on another person." *Id.* at 9 (quoting *Chen*, 381 F.3d at 227). Any other rule "would create numerous practical difficulties that the BIA might reasonably have chosen to avoid." *Id.* at 10 (quoting *Chen*, 381 F.3d at 228).

We recognize that two circuits have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the family planning laws, then the couple should be considered married for the purposes of claiming asylum under the *C-Y-Z-* decision. *Ma v. Ashcroft*, 361 F.3d 553, 558-61 (9th Cir. 2004); *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). However, both of those decisions were rendered before the BIA's *S-L-L-* decision interpreting the spouse requirement in *C-Y-Z-*, and therefore are of little persuasive value now. Having conducting our own Chevron analysis after *S-L-L-*, we find the requirement that an applicant be "legally married" to the mother of his aborted child to be reasonable for the reasons discussed above. Because Yang and Ling's traditional marriage was not recognized under the laws of China, Yang cannot claim refugee status under the provision in § 1101(a)(24) that "a person who has been forced to abort a pregnancy . . . shall be deemed to have been persecuted on account of political opinion."

Yang's final argument is that even if he was not legally married to Ling, he is still a refugee under the part of § 1101(a)(42) which grants protection to any "person . . . who has been persecuted for . . . other resistance to a coercive population control program." In *S-L-L-* the BIA explained:

> That the holding in *Matter of C-Y-Z-* is limited to legally married spouses does not mean that an unmarried applicant may never demonstrate past persecution in the context of a partner's forced abortion or sterilization . . . . [T]here may be cases in which an unmarried partner in an extremely close and committed relationship may demonstrate persecution based on the clause referring to "other resistance to a coercive population control program."

24 I. & N. Dec. at 10.

BIA held that "[i]n the context of coercive family planning, the term 'resistance' covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." *Id.* In a follow up to *S-L-L-*, the Ninth Circuit held that an applicant establishes "resistance" where he "physically or vocally resisted birth control officials while the officials performed duties related to the birth control program." *Lin v. Gonzales*, 472 F.3d 1131, 1135 (9th Cir. 2007). However, "[i]n addition to meeting the nexus requirement based on 'resistance' to the family planning law, an applicant claiming persecution based on an unmarried partner's abortion must demonstrate that he has suffered harm amounting to persecution on account of that resistance." *S-L-L-*, 24 I. & N. Dec. at 10; see also *Lin*, 472 F.3d at 1135 ("Even though Lin resisted a coercive population control program, and thus satisfied the 'on account of political opinion' component of § 1101(a)(42)(B), this finding does not automatically establish persecution. Instead . . . Lin must also

demonstrate past persecution or a well-founded fear of future persecution.").

Finally, in determining whether an unmarried partner is in an extremely close and committed relationship with the pregnant mother, the BIA said one should look to:

> whether the couple has children together, has cohabited for a significant length of time, holds themselves out to others as a committed couple, has taken steps to have their relationship recognized in some fashion (perhaps having taken such steps repeatedly, as where permission to marry has been denied by authorities based on failure to meet the minimum age requirements), is financially interdependent, and whether persuasive objective evidence of that relationship's continued existence during the time that the applicant has been in the U.S. is presented.

S-L-L-, 24 I. & N. Dec. at 10-11 (quotation omitted).

In this case, the BIA found that Yang "ha[d] not met his burden of proving his persecution claim on account of his own resistance to a coercive population control program or resistance to the alleged forced abortion of his partner." Even assuming that the documentary evidence established that Ling and Yang had an extremely close and committed relationship and that Yang resisted family planning officials at the hospital where Ling was taken to have an abortion, the evidence does not compel the conclusion that Yang was persecuted on account of his resistance to Ling's abortion. The documentary evidence established: (1) that Yang had a physical altercation with family planning officials; (2) that Yang was

subpoenaed by the local security office; (3) the "cadres of the Family Planning Unit were looking for [Yang] and tried to arrest him"; and (4) "the Family Planning Officials and the Village Cadres are still looking for [Yang] and tried to arrest [him]."

This is insufficient to establish persecution. In *Zheng v. United States Attorney General*, 451 F.3d 1287 (11th Cir. 2006), we held that evidence the asylum petitioner had been detained by the Chinese government for five days but had suffered no injuries did not compel the conclusion that he had been persecuted. *Id.* at 1290-91. Here, Yang was not detained for any length of time and, as far as we can tell from the record, suffered no physical injuries from his encounter with the family planning officials. While Yang was subpoenaed and threatened with arrest for opposing China's family planning laws, the State Department's country report, in the section titled "Penalties and Rewards," stated that in the Fujian province where Yang is from, those who have more children than permitted are assessed a fine, but the Consulate General "did not find any cases of physical force actually employed in connection with abortion or sterilization. In interviews of Fujian visa applicants who had several children, U.S. Consular officers found many violators of the one-child policy paid fines; however, the officers had personally seen no forced abortion or property confiscation."

From this record, having suffered no prolonged detention or physical violence, and being at little risk of physical violence for having opposed the family planning laws if returned to China, we are not compelled to conclude that Yang was subject to past persecution or has a well-founded fear of future persecu-

tion. Accordingly, we will deny his petition to review the BIA's decision on his asylum claim.

Moreover, because there is no evidence compelling a finding that Yang was persecuted, he cannot meet the higher burden for withholding of removal by pointing to evidence compelling a finding that it is more likely than not that he will be persecuted upon his return to China. See *Al Najjar*, 257 F.3d at 1292-93 ("Where an applicant is unable to meet the 'well-founded fear' standard for asylum, he is generally precluded from qualifying for either asylum or withholding of [removal]."). We will therefore deny his petition to review the BIA's decision on his withholding of removal claim.

PETITION DISMISSED IN PART AND DENIED IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-15742

Non-Argument Calendar

Agency No. A77-977-849

YI QIANG YANG,

Petitioner

versus

U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of a Decision of the Board of Immigration Appeals

---

(July 12, 2007)

Before BLACK, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

Yi Qiang Yang, a native and citizen of China, entered the United States illegally on September 28, 2001. While he was detained at the airport, immigra-

tion officials conducted an entrance interview. They asked Yang why he came to the United States. He said that he came because America was "better [than] China" and "the greatest country in the world," and he wanted "to earn a living." Yang was then asked whether he had any reason to fear returning to China. He said that he might be put in jail for not having a passport, but that he would not be harmed. However, Yang continued, he "really [did not] want to go back to China." When asked for his marital status, Yang said he was "single."

Yang was charged with removal for, among other things, failing to possess a valid entry document at the time he sought admission into the country, in violation of 8 U.S.C. § 1182(a)(7)(A)(i)(I). Yang conceded that he was removable based on this charge. He also applied for asylum, withholding of removal, and relief under the Convention Against Torture.

At his asylum hearing, Yang testified that he and Jiang Hui Ling had a "traditional marriage ceremony" with friends and family on July 15, 2000. They could not be formally married, according to Yang, because under Chinese law they were under the legal age-Yang was 20 and Ling was 17.

The couple discovered that Ling was pregnant in February 2001. Because they were not legally married, Yang said, the Chinese government would force Ling to have an abortion if it discovered that she was pregnant. To avoid detection, Yang and Ling hid at Yang's grandmother's house.

The government found out anyway. On July 3, 2001, family planning officials took Ling to the hospital to have an abortion. When Yang discovered that Ling was missing, he went to the hospital to free her.

Once there, five government officials began to beat Yang, but, according to him, he grabbed a broom, beat the officials off of him, and escaped.

Yang did not return to his home because the family planning officials were waiting for him there; the next day they sent a subpoena ordering that Yang come to the local security office. Yang later heard that Ling had been forced to abort the baby. He left China on September 25, 2001.

In addition to his testimony, Yang submitted corroborating evidence in support of his asylum petition. Among the exhibits introduced at the asylum hearing, Yang offered: (1) the State Department's country report on China; (2) a note from Lianjiang hospital, dated July 3, 2001, stating that Ling had an induced abortion; (3) a subpoena from the local security office, dated July 4, 2001, summoning Yang to its office the next day; (4) a receipt, dated July 2, 2000, for two wedding rings paid for by Yang; and (5) a letter from Yang's uncle stating that he attended Yang's "traditional wedding" on July 15, 2000, Yang and Ling were married by traditional means because "early marriage is forbidden," and when Ling was forcibly taken by family planning officials to have an abortion, Yang "tried to save his wife and fought with the officials."

Yang's exhibits also included an affidavit and a letter from Ling. The affidavit, dated March 10, 2005, stated that she and Yang "held a wedding according to the old traditional custom on July 15, 2000 . . . and started to live together without going through the marriage registration formalities." The letter, dated January 7, 2003, gave the following account of her marriage, pregnancy and abortion:

Dear Husband, do you still remember our wedding on July 15, 2000? Sometime after our marriage, in around February 2001, I did not feel good and went to see a doctor. It was then we found out I would give birth to our child . . . . But since China has a very strict checking system on Family Planning, we women have to have physical check up every three-month. On July 3rd, Mom called us and said she was very sick. We were very worry and afraid something might happen, so we rushed back to visit her. After you found out she was really sick, you sent her to the hospital immediately and left me home alone. At around 2 p.m. in the afternoon there came seven people. They claimed they were from the Family Planning Office and tried to take me away forcefully. Even though I tried to struggle and begged for their mercy, they would not bother to care. They took me to Lianjiang County Hospital and locked me up in a room. A moment later two nurses came inside. One of the nurses who had a syringe in her hand gave me a shot in my abdomen. After a few minutes, I had a very sharp pain in that area. And after my baby came out of my body, I saw the nurses put the poor baby in a plastic bag. I was so shock that I passed out. After I regain my consciousness, my mother told me that you tried to save me and fought with the officials of the Family Planning Office. The Cadres of the Family Planning Unit were looking for you and tried to arrest you.

The immigration judge found that Yang was not entitled to asylum because he had not established

that he was subject to past persecution or that he had a well-founded fear of future persecution. The IJ acknowledged that in *Matter of C-Y-Z-* the Board of Immigration Appeals held "that an alien who's [sic] spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion as a refugee within the definition of that word under Section 101(a)(42) of the Immigration and Nationality Act." But the IJ found that Yang had "failed first of all to prove that he and this person he describes as his wife entered into a traditional marriage in [his] country of China."

The IJ also found that Yang had "failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China." And, the IJ found that in Yang's "own mind he is single. That's why he answered the question regarding his marital status as being single."

The IJ concluded that Yang had "failed to establish . . . a spousal relationship between him and the person he described or referred to as his wife throughout his application." Therefore,

> even if the Court were to conclude that [Yang] was able to prove that the person he refers to as his wife was forced to undergo abortion he cannot benefit from that. The reason is that he failed to show that they were legally married and the decision in the *Matter of C-Y-Z-*, applies only where a spousal relationship has been established between the respondent and the spouse. The Court concludes that the Board of Immigration Appeals['] [decision] in the *Matter of C-Y-Z-*, does not apply in [Yang]'s case.

The IJ also concluded as an alternative ground for denying Yang's petition that the encounter with family planning officials he described was not sufficiently serious to constitute persecution. As to any well-founded fear of future persecution, the IJ found Yang's testimony to be not credible, and therefore, according to the IJ, Yang had not presented sufficient evidence that "anyone in China is looking for him on account of a protected ground."

Because Yang had not met his burden as to asylum, the IJ concluded that he could not meet the higher burden for establishing entitlement to withholding of removal. And as to Yang's CAT claim, the IJ concluded that Yang had "failed to establish that he was tortured in his country or that it is more likely than not that he would be tortured if he were to return to his country."

The BIA dismissed Yang's appeal of the IJ's decision. The BIA agreed with the IJ that "an applicant must have entered into a legally recognizable marriage in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*.," and "[u]nderage couples living in de facto unregistered relationships are not recognized as married by the Chinese government."

The BIA also concluded that Yang was not entitled to relief based on his own independent opposition to China's population control program. The BIA agreed with the IJ that Yang was not credible given the inconsistencies between his initial airport interview and his asylum application. Therefore, the BIA concluded that Yang's testimony regarding his confrontation with the family planning officials was to be disregarded.

Yang petitions for review of the BIA's decision on his asylum and withholding of removal claims.[1] He contends that: (1) the BIA's disparate treatment of lawfully married couples from traditionally married couples is a violation of the Equal Protection Clause; (2) the BIA's adverse credibility finding is not supported by the record; (3) the BIA's decision that Yang and Ling's marriage was not a spousal relationship was an unreasonable interpretation of the refugee statute, 8 U.S.C. § 1101(a)(42), and the *C-Y-Z-* decision; and (4) the BIA's conclusion that Yang had not been persecuted for resisting China's coercive population control program was not supported by the record.

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien in this country if he meets the definition of "refugee." 8 U.S.C. § 1158(b)(1). A "refugee" is

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

---

[1] Yang has not sought review of the BIA's decision to deny him relief under the CAT. He has therefore abandoned that issue here. See *Sepulveda v. United States Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

Id. § 1101(a)(42). "[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion . . . ." *Id.*

The BIA's factual determinations are reviewed under the substantial evidence test, and we must affirm the BIA's decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole. *Al Najjar v. Aschroft*, [sic] 257 F.3d 1262, 1283-84 (11th Cir. 2001). The substantial evidence test is deferential and does not allow us to re-weigh the evidence from scratch. *Mazariegos v. Office of United States Att'y Gen.*, 241 F.3d 1320, 1323 (11th Cir. 2001). The BIA's "decision can be reversed only if the evidence 'compels' a reasonable fact finder to find otherwise." *Sepulveda*, 401 F.3d at 1230 .

Yang first argues that BIA's disparate treatment of legally married couples from traditionally married couples violated the Equal Protection Clause. We cannot reach the merits of Yang's equal protection argument because he failed to exhaust his administrative remedies by raising it before the BIA. *Amaya-Artunduaga v. United States Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006) (petitioner failed to exhaust his administrative remedies where he did not raise argument in notice of appeal or brief before the BIA). Accordingly, we lack jurisdiction to consider the argument now. *Id.* (the Court "lack[s] jurisdiction to consider a claim raised in a petition for review unless the petitioner exhausted his administrative remedies with respect thereto"); see also 8 U.S.C. §

1252(d) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right . . . ."). We will therefore dismiss this part of Yang's petition.

Yang's second contention is that the BIA's adverse credibility finding is not supported by the record. Specifically, Yang argues that inconsistencies between his initial interview at the airport and his later statements do not necessarily suggest, as the BIA concluded, that his later statements are not credible. Indeed, three of our sister circuits have held that an airport interview should only be used against an alien where the interview meets certain indicia of reliability. See *Balogun v. Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004) ("airport interviews only are useful and probative if they are reliable"); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the BIA must be cognizant of the interview's limitations when using its substance against an asylum applicant."); *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998) ("That there were some inconsistencies between the airport statement and Balasubramanrim's testimony before the immigration judge is not sufficient, standing alone, to support the Board's finding that Balasubramanrim was not credible.")

We have had no occasion to address the reliability of airport interviews, and this case continues that trend. There was other evidence in the record supporting Yang's account of the events, but even assuming for present purposes that everything he said is true, he still has not met his burden to establish that the BIA's decision to deny him asylum and

withholding of removal was not supported by substantial evidence, as we discuss below.

Yang next argues that the BIA's decision that only legal spouses are entitled to protection under the family planning provisions of the refugee statute, 8 U.S.C. § 1101(a)(42), is an unreasonable application of that statute. In its *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (en banc), decision, the BIA confirmed the INS' position that "the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution." *Id.* at 918. Quoting from a 1996 INS memorandum, the BIA said that "an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition." *Id.* at 917-18.

In its *In re S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006) (en banc), decision the BIA "decline[d] to extend [its] holding in *Matter of C-Y-Z-*, as modified, to unmarried applications claiming persecution based on a partner's abortion or sterilization." *Id.* at 4. "[W]e limit our holding to applicants who are legally married under Chinese law." *Id.* (footnote omitted). This limitation was necessary, the BIA said, because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father. From the point of view of the wife, the local community, and the government, a husband shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives . . . ." *Id.* at 9. The BIA continued: "In the absence of a legal marriage, evaluating the existence of the requisite

nexus is problematic, both as to whether the applicant was, in fact, the father of the child and as to whether local officials considered him responsible, or were even aware of his involvement." *Id.* at 9-10.

Yang argues that the legal marriage requirement in *S-L-L-* is unreasonable. The BIA's interpretation of immigration statutes are due *Chevron* deference where appropriate. *Balogun v. United States Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005). "Under Chevron *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984), where Congress in a statute has not spoken unambiguously on an issue, the interpretation of the statute by an agency entitled to administer it is entitled to deference so long as it is reasonable." *Mazariegos*, 241 F.3d at 1327 n. 4. "The degree of deference is especially great in the field of immigration." *Id.*

Here, Congress has not spoken unambiguously on the issue of whether husbands are permitted to step into their wives shoes for the purpose of family planning refugee status. The decision to allow husbands to claim refugee status because their wives were forced to have abortions was based solely on the BIA's interpretation of the refugee statute in C-Y-Z - and S-L-L-, and not on anything Congress explicitly said in § 1101(a)(42). Thus, we must determine whether the BIA's interpretation of "spouse" to include only those who are "legally married" was reasonable, giving great deference to the BIA's decision.

We conclude that the BIA's interpretation was reasonable. As the Board noted in the S-L-L- decision, legal marriage reflects a sanctity and long-term commitment that other forms of cohabitation simply do not. A legal husband, at least in the eyes of the government, shares significantly more responsibility

in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives.

Furthermore, as the BIA observed, "benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the Immigration and Nationality Act that 'it would seem absurd to characterize reliance on marital status in C-Y-Z- as arbitrary and capricious.' " *S-L-L-*, 24 I. & N. Dec. at 9 (quoting *Chen v. Ashcroft*, 381 F.3d 221, 227 n. 6 (3d Cir. 2004)). We agree. Paternity of the baby is presumed when a woman gives birth in wedlock. As the BIA noted, determining paternity of the aborted baby is considerably more difficult, yet essential for asylum based on family planning refugee status, where the mother and father have no legal relationship. *Id.* at 10. Using marital status is "a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance of a forced abortion or sterilization on another person." *Id.* at 9 (quoting *Chen*, 381 F.3d at 227). Any other rule "would create numerous practical difficulties that the BIA might reasonably have chosen to avoid." *Id.* at 10 (quoting *Chen*, 381 F.3d at 228).

We recognize that two circuits have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the family planning laws, then the couple is married for the purposes of claiming asylum under the *C-Y-Z-* decision. *Ma v. Ashcroft*, 361 F.3d 553, 558-61 (9th Cir. 2004); *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). However, both of those deci-

sions were rendered before the BIA's *S-L-L-* decision interpreting the spouse requirement in *C-Y-Z-*, and therefore are of little precedential value. Having conducting our own Chevron analysis after *S-L-L-*, we find the requirement that an applicant be "legally married" to the mother of his aborted child to be reasonable for the reasons discussed above.

Accordingly, following *S-L-L-*, we hold that for a male to claim refugee status pursuant to the provision in § 1101(a)(42) that "a person who has been forced to abort a pregnancy . . . shall be deemed to have been persecuted on account of political opinion," he must be "legally married" to the mother of his aborted baby under the laws of his native country. Because Yang and Ling's traditional marriage was not recognized under the laws of China, Yang cannot claim refugee status under the provision.

Yang's final argument is that even if he was not legally married to Ling, he is still a refugee under the part of § 1101(a)(42) which grants protection to any "person . . . who has been persecuted for . . . other resistance to a coercive population control program." In *S-L-L-* the BIA explained:

> That the holding in *Matter of C-Y-Z-* is limited to legally married spouses does not mean that an unmarried applicant may never demonstrate past persecution in the context of a partner's forced abortion or sterilization . . . . [T]here may be cases in which an unmarried partner in an extremely close and committed relationship may demonstrate persecution based on the clause referring to "other resistance to a coercive population control program."

24 I. & N. Dec. at 10.

BIA held that "[i]n the context of coercive family planning, the term 'resistance' covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." *Id.* In a follow up to *S-L-L-*, the Ninth Circuit held that an applicant establishes "resistance" where he "physically or vocally resisted birth control officials while the officials performed duties related to the birth control program." *Lin v. Gonzales*, 472 F.3d 1131, 1135 (9th Cir. 2007). However, "[i]n addition to meeting the nexus requirement based on 'resistance' to the family planning law, an applicant claiming persecution based on an unmarried partner's abortion must demonstrate that he has suffered harm amounting to persecution on account of that resistance." *S-L-L-*, 24 I. & N. Dec. at 10; see also *Lin*, 472 F.3d at 1135 ("Even though Lin resisted a coercive population control program, and thus satisfied the 'on account of political opinion' component of § 1101(a)(42)(B), this finding does not automatically establish persecution. Instead . . . Lin must also demonstrate past persecution or a well-founded fear of future persecution.").

Finally, in determining whether an unmarried partner is in an extremely close and committed relationship with the pregnant mother, the BIA said one should look to:

> whether the couple has children together, has cohabited for a significant length of time, holds themselves out to others as a committed couple, has taken steps to have their relationship recognized in some fashion (per-

> haps having taken such steps repeatedly, as where permission to marry has been denied by authorities based on failure to meet the minimum age requirements), is financially interdependent, and whether persuasive objective evidence of that relationship's continued existence during the time that the applicant has been in the U.S. is presented.

S-L-L-, 24 I. & N. Dec. at 10-11 (quotation omitted).

In this case, the BIA found that Yang "ha[d] not met his burden of proving his persecution claim on account of his own resistance to a coercive population control program or resistance to the alleged forced abortion of his partner." Even assuming that the documentary evidence established that Ling and Yang had an extremely close and committed relationship and that Yang resisted family planning officials at the hospital where Ling was taken to have an abortion, the evidence does not compel the conclusion that Yang was persecuted on account of his resistance to Ling's abortion. The documentary evidence established: (1) that Yang had a physical altercation with family planning officials; (2) that Yang was subpoenaed by the local security office; (3) the "cadres of the Family Planning Unit were looking for [Yang] and tried to arrest him"; and (4) "the Family Planning Officials and the Village Cadres are still looking for [Yang] and tried to arrest [him]."

This is insufficient to establish persecution. In *Zheng v. United States Attorney General*, 451 F.3d 1287 (11th Cir. 2006), we held that evidence the asylum petitioner had been detained by the Chinese government for five days but had suffered no injuries did not compel the conclusion that he had been persecuted. *Id.* at 1290-91. Here, Yang was not detained

for any length of time and, as far as we can tell from the record, suffered no physical injuries from his encounter with the family planning officials. While Yang was subpoenaed and threatened with arrest for opposing China's family planning laws, the State Department's country report, in the section titled "Penalties and Rewards," stated that in the Fujian province where Yang is from, those who have more children than permitted are assessed a fine, but the Consulate General "did not find any cases of physical force actually employed in connection with abortion or sterilization. In interviews of Fujian visa applicants who had several children, U.S. Consular officers found many violators of the one-child policy paid fines; however, the officers had personally seen no forced abortion or property confiscation."

From this record, having suffered no prolonged detention or physical violence, and being at little risk of physical violence for having opposed the family planning laws if returned to China, we are not compelled to conclude that Yang was subject to past persecution or has a well-founded fear of future persecution. Accordingly, we will deny his petition to review the BIA's decision on his asylum claim.

Moreover, because there is no evidence compelling a finding that Yang was persecuted, he cannot meet the higher burden for withholding of removal by pointing to evidence compelling a finding that it is more likely than not that he will be persecuted upon his return to China. See *Al Najjar*, 257 F.3d at 1292-93 ("Where an applicant is unable to meet the 'well-founded fear' standard for asylum, he is generally precluded from qualifying for either asylum or withholding of [removal]."). We will therefore deny his pe-

tition to review the BIA's decision on his withholding of removal claim.

PETITION DISMISSED IN PART AND DENIED IN PART.

APPENDIX C

FILE: A77 849 – ORLANDO

DATE: Oct. 2, 2006

IN RE: YI QIANG YANG a.k.a.

Edmond Chen a.k.a. Yi Chang Yong

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Theodore Cox, Esquire

ON BEHALF OF DHS:
Richard A. Jamadar
Assistant Chief Counsel

CHARGE:

File: A77 849 – Orlando

Date: Oct. 2, 2006

Notice:

Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] Fraud or willful misrepresentation of a material fact

Sec. 212(a)(6)(C)(ii), I&N Act [8 U.S.C. § 1182(a)(6)(C)(ii)] False claim of United States citizenship

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] Immigrant - no valid immigrant visa or entry document

APPLICATION:

Asylum; withholding of removal; relief under the Convention Against Torture

The respondent has appealed from the Immigration Judge's decision dated April 29, 2005. We concur with the Immigration Judge that the respondent has not met his burden of proving eligibility for the relief sought. The respondent, a native and citizen of the People's Republic of China, bases his claim on the involuntary abortion of a woman that he claims he married in a traditional marriage ceremony.

We have found that an applicant must have entered into a legally recognized marriage in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) (an alien whose spouse was forced to undergo an involuntary abortion or sterilization procedure can establish persecution on account of political opinion). *Matter of S-L-L-*, 24 I&N Dec. 1, 12 (BIA 2006).[1] Underage couples living in de facto unregistered relationships are not recognized as married by the Chinese government. *Id.* at n.13. Accordingly, *Matter of C-Y-Z-, supra*, does not apply to the respondent's case.

In the absence of a qualifying marital relationship, an applicant must show that he has suffered or will suffer persecution on account of "other resistance to a coercive population control program" within the meaning of section 101(a)(42) of the Act. *Matter of S-L-L-, supra*. In this case, the respondent claims that he confronted local authorities after his partner's abortion, that he was subsequently subpoenaed, and that authorities visited his home. We find no clear

---

[1] We recognize that two circuit courts have held to the contrary where the applicant has entered into a traditional marriage. *Matter of S-L-L-, supra*, at n. 14; *see also Zhang v. Gonzalez*, 434 F.3d 993 (7th Cir. 2006); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004).

error in the Immigration Judge's conclusion that the respondent did not testify credibly on these points, however, particularly where he did not describe any of these incidents during his airport interview (Exh. 18).

The testimony of an applicant, if found to be credible, is alone sufficient to establish eligibility for asylum. *D-Muhumed v. United States Attorney General*, 388 F.3d 814, 818-19 (11th Cir. 2004). However, inconsistent or embellished testimony could lead to an adverse credibility finding. *Dailide v. United States Attorney General*, 387 F.3d 1335, 1343 (11th Cir. 2004) (affirming the BIA's adverse credibility determination, which was based upon its finding that the applicant's testimony conflicted with his answers to interrogatories, affidavit, deposition, and other documentary evidence). Although uncorroborated but credible testimony may be sufficient to sustain an applicant's burden of proving eligibility for asylum, "[t]he weaker an applicant's testimony [ ] the greater the need for corroborative evidence." *Yang v. United States Attorney General*, 418 F.3d 1198, 1201 (11th Cir. 2005). However, "an adverse credibility determination does not alleviate the IJ's duty to consider other evidence produced by an asylum applicant," and the IJ must provide "specific, cogent reasons" for her credibility finding. *Forgue v. United States Attorney General*, 401 F.3d 1282, 1287 (11th Cir. 2005).

In the case before us, the Immigration Judge relied on the respondent's sworn airport statement. Although the respondent argues that airport statements are not reliable, the United States Court of Appeals for the Eleventh Circuit, under whose jurisdiction this case arises, has not made such a finding.

The respondent argues that he was intimidated during the airport interview. We note, however, that the interview was conducted in Mandarin, the respondent was apprised of his rights before his statement was taken, and he was repeatedly asked whether he feared returning to China (Exh. 18). Under these conditions, we do not find the Immigration Judge's reliance on the airport statement to be improper. The omissions from the airport statement raise significant doubts as to the respondent's credibility and, even considering the evidence provided by the respondent in support of his claim, we find no clear error in the Immigration Judge's determination that he did not testify credibly.

Consequently, we find that the respondent has not met his burden of proving his persecution claim on account of his own resistance to a coercive population control program or resistance to the alleged forced abortion of his partner. We therefore agree with the Immigration Judge that the respondent has failed to meet his burden of proof for asylum, as well as the higher burdens for withholding of removal and protection pursuant to the Convention Against Torture. *See INS v. Stevic*, 467 U.S. 407 (1984); 8 C.F.R. § 1208.16(b); 8 C.F.R. § 1208.16(c)

ORDER: The appeal is dismissed.

/s/ Brian M O'Leary
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Orlando, Florida
File A77 977849
April 29, 2005
In the Matter of
YANG, YI QIANG
Respondent
IN REMOVAL PROCEEDINGS
ON BEHALF OF RESPONDENT
Agnes Chau, Esquire
ON BEHALF OF DHS
Cori White, Esquire
Assistant Chief Counsel

CHARGE: Section 212 (a)(6)(C)(i) of the Immigration and Nationality Act, as any alien who by fraud or willful misrepresenting a material fact seeks to procure or has sought to procure a visa, other documentation or entry into the United States or other benefit provided under the Act.

Section 212(a)(6)(C)(ii) of the Immigration and Nationality Act, in that you're an alien who falsely represents or has falsely represented himself or herself to be a citizen of the United States for any purpose or benefit under this Act.

Section 212(a)(7)(A)(i) of the Immigration and Nationality Act, as an immigrant who at the time of application for admission is not in possession of a

valid, unexpired immigrant visa or reentry permit, border crossing identification card or other valid entry documents required by the Act and a valid unexpired passport or other suitable travel document or document of identity and nationality as required under regulations issued by the Attorney General under Section 211(a) of the Immigration and Nationality Act.

APPLICATIONS: Under Section 208 of the Immigration and Nationality Act, political asylum, Section 241(b)(3) of the Immigration and Nationality Act, and withholding of removal. The respondent is also seeking relief under the United Nations Convention Against Torture.

ORAL DECISION OF
THE IMMIGRATION JUDGE

The respondent was issued with this Notice to Appear which is dated October 5th, 2001. The Notice to Appear states that the respondent is a native and citizen of China and that he arrived at the Los Angeles, California, airport on or about September 20, 2001, and applied for admission. Allegation states that the respondent fraudulently or willfully misrepresented a material fact in seeking to procure documentation or entry into the United States in that he presented himself as a U.S. citizen, presenting an altered U.S. passport in the name of Chen, Edmond, date of birth 7-26-75, a naturalized Vietnamese national. And allegation number 8 states that he did not possess or present a valid immigrant visa, reentry permit or the border crossing identification card or other valid document to enter the United States.

The respondent, through counsel, has admitted allegations with the 1 through 4, 5 and 6 and 8.

However, the respondent is denying allegation number 7, and he is also denying the two charges under Section 212(a)(6)(C)(i) and (ii) but he's conceding the charge under Section 212(a)(7)(A)(i)(I).

The respondent submitted an affidavit in connection with the allegation number 7, and the two charges that he's denying. This affidavit has been marked as Exhibit 3 of the court's record. In this statement the respondent states that he did not know where the passport that he traveled into the United States came from nor the content of the passport. The officer stated that when he passed through immigration he told the officer in Chinese that the passport was not his but the officer did not understand him so he brought him in front of a Chinese interpreter. He also told the Chinese interpreter that the passport did not belong to him. Then the interpreter brought him to the Immigration Office inside the airport where they took his affidavit. He also stated that he did not present himself as a United States citizen or falsely represented himself to be a citizen of the United States. He also stated that since he did not read, write nor speak English he did not know the passport he was holding was in fact a United States passport.

The respondent testified in court about the passport and how he obtained the passport. He testified that he took passport sized pictures and gave them to the person who helped him to get the passport and other documentation for his travel to the United States. The respondent confirmed in court that the photograph in the passport is in fact his photograph and this is the photograph that he gave to the snakehead. The respondent also informed the Court that he did not know what was in the passport and

he also did not open the passport to know what was in the passport. The Court found the respondent's testimony in court to be consistent with the respondent's claim that he did not know what was in the passport or the name in the passport or what was in the passport. In the sense that the respondent, according to the airport statement which has been marked as Exhibit 18 of the court's record, when he was referred to Edmond Chen said that in response to the question whether he's been known by any names he stated that was not his name. He answered but then he said Edmond Chen but that is not his name. The record shows that the question was if you are not known by any other name and what was the name in the U.S. passport that you presented to Immigration for inspection today and he said Edmond Chen but that is not my name.

The respondent also testified inconsistently when he informed the Court that when he arrived at the airport in the United States it was inspector who shout out his name to him. That was when he knew that that was the name in the passport. This is again inconsistent with the information in the statement. If the respondent at that time had not even handed the passport to the official how would the official know that that was the name in the passport. Later on the respondent changed his testimony and said that the inspector actually approached him or as he described it went at him or approached him, in effect, and that is how he knew that he was the one that the inspector was asking for or calling. The Court also notes that according to the respondent's information he took the passport size photographs and gave them to the person who prepared the documents for him to put in the passport for him. Today he denied that he did not know how this photograph got into the pass-

port and the Court did not find him to be believable. In view of these inconsistencies and the fact that the passport shows clearly that the respondent's photograph is in the photograph and he's also confirmed that, the Court concludes that the respondent willfully misrepresented a material fact in seeking to enter the United States. Also by presenting the passport, United States passport, which he intentionally took a picture to be provided with, he presented himself as a United States citizen. It is clear that the passport was altered by the insertion of the respondent's photograph. I therefore conclude that allegation number 7 has been established and based upon that I will sustain the two charges of removability under Section 212 (a)(6)(C)(i) and Section 212 (a)(6)(C)(ii) of the Immigration and Nationality Act.

Since he has already conceded the third charge of removability I conclude that the respondent's removability has been established on all the charges in the Notice to Appear. The Court notes that copy of the page of the passport with the respondent's photograph has been marked as Exhibit 24, and is part of the record. The Court also concludes that the respondent's removability has been established as charged, based upon the three charges of removability.

The respondent is seeking asylum, withholding of removal and also relief under the United Nation's Convention Against Torture. The respondent submitted an application on Form I-589 which has been marked as Exhibit 2 of the court's record. He submitted a first statement which was marked as Exhibit 2A, and then he submitted an amendment to the statement which was marked as Exhibit 2B. The respondent submitted the statement in connection with

the charges which was marked as Exhibit 3. He submitted additional documents, birth certificate marked as Exhibit 4. Pictures showing male and female, he stated that this was a picture of him and his spouse, is marked as Exhibit 5. Subpoena is marked as Exhibit 6. A document described as induced abortion document marked as Exhibit 7. These documents will be admitted into evidence. The birth certificate will be given full weight but the picture and the subpoena and the induced abortion documents will not be given weight. The Court will just accept the picture of the respondent and another female person, not necessarily his wife. With respect to the subpoena, the Court questions the authenticity of that document since the respondent did not even mention this document when he first arrived in the United States, at the airport. Also the induced abortion, since he did not even mention this upon his first arrival at the airport when he was questioned, as reflected in Exhibit 18 of the court's record. The other documents include background documents marked as group Exhibit 8. Copies of decisions marked as Exhibit 9. Birth certificate of person he describes as his wife marked Exhibit 10, which will be admitted just show what is the document. The document purporting to be a receipt for rings that the respondent bought is marked Exhibit 11, to be just admitted to show what is in this but not to show that this was a receipt for rings that the respondent bought for his wedding. The respondent submitted letters purporting to be from his spouse's uncle. These are marked as Exhibit 12 and 13, respectively. This will also be admitted into evidence but not for the truthfulness of the information in those documents. Exhibit 14, also purports to be a notarial statement by the wife. This will also be admitted but not for the truthfulness of

the information in this document. The envelope submitted will group together as group Exhibit 15. Amendments to translations, certification, etcetera are grouped together as group Exhibit 16. Affidavit is marked as Exhibit 17 just to be admitted as part of the background information in this matter.

The Department of Homeland Security submitted the record of sworn statement which I have referred to and is marked Exhibit 18. The credible fear interview package marked as Exhibit 19. The human right's report on China marked as 20. The profile marked as 21. The Court also marked into evidence a custom's declaration form and also the calendar for the year 2000, as 22 and 23. All of these will be admitted into evidence. The respondent's counsel did not object to the admission of any of these documents into evidence.

The issue of removability having been resolved, the sole issue before the Court is whether the respondent's application for relief from removal should be granted.

APPLICABLE LAW FOR ASYLUM

In order to establish his statutory eligibility for asylum under Section 208 of the Immigration and Nationality Act, the respondent has to show that he qualifies as a refugee as defined in Immigration and Nationality Act. Section 101(a)(42) of the Immigration and Nationality Act defines a refugee as a person who is unwilling or unable to return to his country because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group or political opinion. The definition of a refugee was expanded by an amendment to the Immigration and

Nationality Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 101(a)(42) in part defines a refugee to include an alien who has been forced to abort a pregnancy or to undergo involuntary sterilization or who has been persecuted for resistence to a coercive birth control program. Such a person is deemed to have been persecuted on account of his or her political opinion. The Board of Immigration Appeals has held in the *Matter of X-P-T-*, that this new provision supercedes the Board's decision in the *Matter of Change*. The burden is on the respondent to establish that he qualifies as a refugee as defined in Immigration and Nationality Act.

The respondent's application for political asylum also serves as an application for withholding of removal. In order to establish his statutory eligibility for withholding of removal he has to show by a clear probability of the evidence that his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion. The respondent bears the burden of establishing that his life or freedom would be threatened on account of one of the grounds specified for the grant of withholding of removal if he were to return to his country.

SUMMARY OF FACTS

The respondent submitted an application, Form I-589, and he provided the following information in his application. This is marked as Exhibit 2. He provided his date of birth as 11-5-1978, the city as Fuzhou and the country as China. The respondent answered questions in other parts of his application. In the part for spouse he named a female person and he did not indicate that this person is in the United

States, in fact he indicated that this person is in China. He stated the place of marriage as Fozhou City and the date of marriage as 7-15-2000. He did not name any children. He finally stated that he does not have any children.

In response to the question why he's applying for asylum or withholding he marked the box for political opinion. He answered yes to the question whether he or any members of his family have been mistreated and he referred to the affidavit. He also answered yes to a question whether he fears harm if he were to return to his country. He answered yes to the question whether he or any members of his family have been charged, arrested, detained.

In the statement that the respondent submitted to the court which is marked as Exhibit 2B, the Court notes that the respondent's first statement marked as Exhibit 2A, is essentially the same as 2B. 2B is the amended statement. So the Court is relying on this amended statement. In Exhibit 2B, in summary, the respondent stated that he's requesting asylum for himself because of the fear of persecution if he were to return to China. He stated that his claim is based on his past persecution and fear of continued persecution due to his political opposition to China's coercive family planning policy. The respondent stated that he and the wife were married traditionally after they dated for a couple of years. They could not register their marriage because both of them had not reached the legal age of marriage. The respondent stated, however, the wife got pregnant and it was discovered and she was taken for an abortion. He went on to provide the details about what happened to him in China and he stated in part that the marriage took place on July 15th, 2000.

At that time he was 21 years old and the wife was just only 18 years old. The respondent stated that in China at that time the legal age for marriage for a man was 22 and for a woman was 20. Because they had not reached the legal age for marriage they could not apply for marriage license.

The respondent stated that in February of 2001, the wife became sick and the doctor confirmed that she was pregnant. The respondent also stated that because of the Chinese government strict family planning policy he and the wife went into hiding and went to stay at a grandmother's house. The respondent stated on July 3rd, 2001, his mother called him about being sick. They went there with his wife later and when he left his wife at the mother's home the cadres went to the house, took the wife to the hospital and the wife was eight months pregnant at that time and she was forced to undergo abortion. Respondent stated that he went to the family planning office and argued with the cadres and later on after confrontation he was able to get away. The respondent then stated that a subpoena was issued for him to report at the public security bureau on July 5th, 2001, but he didn't go. He came to the United States and then he provided information on the trip to the United States.

The respondent testified in support of his application. In summary he testified that he's 28 years old. He testified that he's married and the marriage took place on July 15, 2000. He testified, however, that he does not have a marriage certificate. He testified today that the wife is in China and she's 23 years old. He also confirmed that he does not have any children. The respondent testified that he and the wife married according to traditional custom and

they invited friends and family to witness. The respondent testified about 2,000 people live in the village that he lives in and that the tradition for them to undergo this kind of ceremony when they couldn't register and get a permit to marry. The respondent testified that they could not get the permit to get married because they had not reached the legal marriage age. The respondent also testified that at the ceremony he and the wife brought tea to the mother and then they drank and celebrated their marriage with friends and family.

The respondent then testified that the wife became pregnant in February 2001. He also testified that in China you are not allowed to have a child if you don't have a marriage certificate. Therefore he and the wife went to hide in the grandmother's house. The respondent testified that the wife was given a forced abortion on July 3rd, 2001. This was after he left the wife in the mother's home and upon the return the neighbors told him that the wife had been taken away from the family planning officials. He went to look for these people and there a confrontation ensued. The respondent was able to run away. Later on a subpoena was issued for his arrest. The wife told him about what happened to her, about how the abortion took place. The respondent testified that a subpoena was sent to him on July 4, 2001, for him to report at the family planning office on July 5, 2001. He did not show up. He left China on September 25, 2001, and arrived in the United States on September 28, 2001.

The respondent identified the photograph marked as Exhibit 5. He said that was a photograph of him and his wife. He also identified the document described as subpoena and he said that the mother

sent it to him. The respondent identified a document described as abortion certificate and he said that the wife asked the hospital for it.

The respondent also testified about his arrival in the United States. He testified that the snakehead gave him the passport to board the plane and he did not know what was in the passport. He described that his education level was through the junior high.

The respondent answered questioned posed by the Government counsel on cross-examination and answered a few questions posed by the Court. He confirmed that the interview, when he arrived at the airport, interpreter was an interpreter in the Mandarin language.

FINDINGS OF THE COURT

The Court concludes that the respondent has failed to present to the Court credible and sufficient evidence to establish that he was a victim of past persecution on account of his political opinion or any of the grounds specified for a grant of asylum in the United States. The Court also concludes that the respondent has failed to present credible and sufficient evidence to establish that he has a well-founded fear of future persecution on account of any of the grounds specified for the grant of asylum in the United States.

The Court also makes an adverse credibility finding in the respondent's case based upon the reasons that will be stated as follows.

The respondent's claim is that he's a native and citizen of China and that, according to his testimony in court today, he's married but he married his wife according to the traditional custom in China. He provided information that he and the wife couldn't regis-

ter their marriage because the respondent and the wife had not reached the legal age of marriage. He stated that at that time in China the legal age of marriage for a man was 22 and for a woman was 20. At that time, according to his testimony he, the respondent, was 21 and the wife was just shy of 18 years, in his own words.

He provided information that in February 2001, the wife got sick and when they went to see a doctor it was discovered that the wife was pregnant. The respondent also testified that in China women cannot give birth to a child if she doesn't have a marriage license. Because of that he and the wife went into hiding. Later on when the mother was sick and they went to see the mother, the wife was dragged by the family planning cadres to the hospital for a forced abortion. The respondent provided information and testified that when he went to check on the wife he had a confrontation with the cadres. He was able to flee. Later a summons was issued for him to report to the public security office but he did not. Arrangements were made for him to come to the United States.

Respondent testifies that he fears returning because he fears harm from the family planning officials and authorities in China if he were to return to China.

The respondent submitted application on Form I-589 with the statement marked as Exhibit 2A and 2B, and he submitted documents and testified in support of his application.

With respect to past persecution the respondent is relying on an alleged forced abortion performed on the person that he described as his wife to establish

that he was a victim of past persecution. The Court notes that the Board of Immigration Appeals in the *Matter of C-Y-Z-*, held that an alien who's spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of that word under Section 101(a)(42) of the Immigration and Nationality Act. In that case the applicant presented evidence that the wife was forced to undergo sterilization procedure under the Chinese government's birth control policy. He also submitted a marriage certificate to confirm that he and the wife were actually and legally married in China. The respondent in *Matter of C-Y-Z-*, established a spousal relationship between him and his wife.

In this respondent's case the respondent has made references to his wife in his statement and also during his testimony today. The respondent informed the Court that he and the wife were married according to traditional custom in China. Therefore he did not produce a marriage certificate in support of his application. The respondent also testified that he and the wife did not register their marriage because they had not reached the legal age of marriage at the time that they got married. The respondent also did not provide a notarial certificate from a member of the village committee or any official to confirm that this marriage took place. The respondent submitted a statement by the wife or a notarial statement by the wife confirming that he and respondent entered into a traditional marriage. In fact this purports to be from his wife.

The Court also notes that the respondent himself testified that as part of the ceremony he and the wife

presented tea to the respondent's mother yet there's no statement or affidavit from the mother confirming the same. The respondent, however, submitted a statement purporting to be a statement from the respondent's uncle. He did not explain why he did not submit a statement from the person who he describes as his wife's family, parents of the respondent's own parents to prove that they in fact entered into this traditional marriage. They also did not provide any pictures of their marriage ceremony.

I therefore conclude that the respondent has failed first of all to prove that he and this person he describes as his wife entered into a traditional marriage in the respondent's country of China.

The Court notes that even if the respondent had been able to provide evidence to show, that he and the person he describes as his wife were married according to traditional custom in China he has failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China. The Court also notes that the respondent's own information that he provided in the sworn statement marked as Exhibit 8 of the court's record, reflects that the respondent stated that he was single upon his arrival in the United States. The respondent testified in court that in the United States he considers himself single but in China he's married. That cannot be that kind of situation. A person is either married or single and the Court concludes that in the respondent's own mind he is single. That's why he answered the question regarding his marital status as being single.

In view of all the above the Court concludes that the respondent has failed to establish that a spousal relationship between him and the person that he de-

scribed or referred to as his wife throughout his application and the statement that he submitted in support of his application. Therefore even if the Court were to conclude that the respondent was able to prove that the person he refers to as his wife was forced to undergo abortion he cannot benefit from that. The reason is that he has failed to show that they were legally married and the decision in the *Matter of C-Y-Z-*, applies only where a spousal relationship has been established between the respondent and the spouse. The Court concludes that the Board of Immigration Appeals in the *Matter of C-Y-Z-*, does not apply in the respondent's case. He has therefore failed to establish that he was a victim of past persecution by virtue of this person's alleged forced abortion.

The Court also concludes that the respondent has also failed to prove that he suffered past persecution on account of his encounter with the family planning officials. He did not present any evidence to show that he suffered any serious injuries as a result of being detained by the family planning officials. There's no evidence that the respondent was arrested or detained or that he suffered any harm at the hands of the Chinese government or a group of persons that the Chinese government is unwilling or unable to control. Therefore he has failed to establish that he was a victim of past persecution on account of a protected ground.

The Court also concludes that the respondent has also failed to present credible and sufficient evidence to establish that he has a well-founded fear of future persecution on account of any of the grounds specified for the grant of asylum in the United States. I find that the respondent failed to present

consistent and sufficient evidence to establish that anyone in China is looking for him on account of a protected ground. The respondent described a confrontation with the cadres and testified that a summons or subpoena was issued for his arrest, yet the Court notes again that when the respondent first arrived in the United States and was questioned at the airport he did not provide this information that he had a wife or that the wife was forced to undergo an abortion and that officials were looking for him. He did not mention that a subpoena had been issued for his arrest. Failure to mention all of these, when first questioned at the airport in the United States cast doubt on the respondent's credibility. The Court notes that the credible fear interview later, the respondent said that he was too scared to mention that and he repeated the same in court. This is not a convincing explanation. The Court did not find the respondent to be believable especially in view of the inconsistencies in the respondent's testimony in court today.

The inconsistencies regarding how the passport was obtained and whether or not he knew what was in the passport and that he knew that he was carrying a United States passport when he was a willing participant in providing the photograph, a passport sized photograph, for this passport to be prepared is also inconceivable that the respondent wouldn't know that he was carrying a passport for his admission to the United States. He also lied about even knowing the name in the passport. The respondent's testimony was entirely inconsistent regarding when and how he got to know that the name in the passport was Edmond Chen. His testimony in court has been found to be inconsistent with information in Exhibit 18. The respondent claimed that he did not

open the passport yet he knew the name Edmond Chen. His testimony was entirely inconsistent because he changed his story in court today and he said that, first he said that he got to know about the name when the inspector waived the passport at him. Yet he was not able to tell the Court at what time that happened. He said that he presented the passport to the inspector and said that that wasn't his passport. So this is inconsistent with his statement in court. Also when he was questioned further about this the respondent said that the inspector, K. Martin, that was her name, he knew that that was the name in the passport.

In view of all the above and having considered all the evidence in the record the Court concludes that the respondent has failed to establish that he qualifies as a refuge as defined in the Immigration and Nationality Act. He also failed to establish his statutory eligibility for the grant of asylum in the United States.

It is not necessary for me to address the question of whether the respondent merits a favorable exercise of discretion. I will make an adverse credibility finding in his case based upon the inconsistencies that are outlined above. Another significant inconsistency is the fact that the respondent testified that his alleged traditional marriage on July 15, 2000, fell on a Tuesday or took place on a Tuesday. The Government counsel submitted the calendar for 2000, and it shows that July the 15, 2000, actually fell on a Saturday. That's an inconsistency. The credibility of the respondent is of extreme importance in assessing his claim for political asylum and in determining the credibility of the respondent. I've taken into account his demeanor while testifying and the fact that he

was able even to change his story as he went along when he was confronted with inconsistencies and answers that he had already given to questions. The Court therefore took into account the rationality, internal inconsistency and persuasiveness in his testimony and if any of these facts were true would satisfy the standard of eligibility for the relief that the respondent is seeking and the Court did not find that to be the case. Therefore the Court makes adverse credibility finding and his application for political asylum will be denied.

In the same vein, the Court will deny the respondent's application for withholding of removal. The Court concludes that he has failed to present credible and sufficient evidence to establish that his life or freedom would be threatened on account of a protected ground if he were to return to his country, China.

Furthermore since he failed to satisfy the lower burden required for asylum he has also failed to satisfied the higher burden required for withholding of removal and his application for withholding of removal will also be denied.

The respondent is also seeking relief under the United Nation's Convention Against Torture. An applicant is entitled to withholding and deferral of removal if the applicant can sustain his burden of proof to show that it is more likely than not that he would be tortured if removed to the proposed country of removal. In the respondent's case I find that he failed to establish that he was tortured in his country or that it is more likely than not that he would be tortured if he were to return to his country. Therefore his request for relief under the United Nations Convention Against Torture will also be denied.

And the following order will be entered;

ORDER

IT IS HEREBY ORDERED that the respondent's application for political asylum be denied.

IT IS HEREBY FURTHER ORDERED that the respondent's application for withholding of removal be also denied.

IT IS HEREBY FURTHER ORDERED that the respondent's request for relief under the United Nations Convention Against Torture be also denied.

IT IS HEREBY FURTHER ORDERED the respondent shall be removed from the United States to the country of the respondent's citizen, China, on the three charges in the respondent's Notice to Appear.

/s/ Victoria Ghartey
Victoria Ghartey
Immigration Judge